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In The

Supreme Court of the United States

GEORGE RODRIGUEZ,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Question One: Congress provided for an enhanced penalty for federal defendants who violate 21 U.S.C. § 841 and who commit that federal crime "after a prior conviction for a felony drug offense has become final." The word "conviction" as used in that statute has never been construed by this Court. Is a defendant "convicted" for the purpose of increased sentencing pursuant to this statute, when the records of the Florida state court proceeding establish the acceptance of a plea of no contest by the trial judge, but also establish that there was no adjudication of guilt, no finding of guilt, no written judgment, and no sentence either to serve any period of imprisonment, or to be placed on probation, or to pay a fine to the State of Florida?

Question Two: Can a federal judge refuse to address a motion to correct a sentence, which is filed pursuant to 28 U.S.C. § 2255, on the basis that this sentence was illegal or on the basis that this sentence was in excess of the statutory maximum, where a similar sentencing issue previously was raised on direct appeal as plain error, but was erroneously decided because the lower courts had neither previously discovered nor discussed controlling precedent and where that defendant's sentence was a denial of due process of law because it actually was illegal and in excess of the statutory maximum applicable to that defendant?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINION BELOW 1

BASIS FOR JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE PETITION 12

CONCLUSION 21

APPENDIX

Opinion of the Lower Appellate Court ..... App. 1

Order of the Lower Appellate Court denying petition for hearing en banc ..... App. 6

Order of the U.S. District Court denying motion pursuant to Title 28 U.S.C. § 2255 ..... App. 7

Order of the U.S. District Court denying motion for reconsideration ..... App. 9

Order of the U.S. District Court granting certificate of appealability ..... App. 10

Transcript of State of Florida plea proceeding ..... App. 12

Excerpt of Opinion of the Lower Appellate Court on direct appeal ..... App. 18

TABLE OF AUTHORITIES

Page

CASES

Bonner v. City of Prichard, Alabama, 661 F.2d 1206 (11th Cir. 1981) 8

Davis v. United States, 417 U.S. 333 (1974) 20

Deal v. United States, 508 U.S. 129 (1993) 16, 19

Dickerson v. New Banner Inst., Inc., 460 U.S. 103 (1983) 13, 14, 15, 19

Garron v. State, 528 So.2d 353 (Fla. 1988) 14

Gonzalez v. United States, 224 F.2d 431 (1st Cir. 1955) 16, 17

Lott v. United States, 367 U.S. 421 (1961) ..... *passim*

Murray v. Carrier, 477 U.S. 478 (1986) 21

Porter v. Nussle, 534 U.S. 516 (2002) 15

Republic of Argentina v. Weltover, Inc., 504 U.S. 607 (1992) 15

United States v. Acosta, 287 F.3d 1034 (11th Cir. 2002) 16

United States v. Cannon, 778 F.2d 747 (11th Cir. 1985) 17

United States v. Dotson, 555 F.2d 134 (5th Cir. 1977) ..... *passim*

United States v. Goldin Indus., Inc., 219 F.3d 1268 (11th Cir. 2000) 18

United States v. Maybeck, 23 F.3d 888 (4th Cir. 1994) 21

United States v. Mejias, 47 F.3d 401 (11th Cir. 1995) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

United States v. Rodriguez, 189 F.3d 485 (11th Cir. 1999) 7

United States v. Rowan, 663 F.2d 1034 (11th Cir. 1981) 19, 20

United States v. Smith, 96 F.3d 1350 (11th Cir. 1996) ..... *passim*

United States v. Steele, 147 F.3d 1316 (11th Cir. 1998) 18

United States v. Willis, 106 F.2d 966 (11th Cir. 1997) 14

OTHER AUTHORITIES

U.S. CONST. Amend. V 1, 10

21 U.S.C. § 841 ..... 8, 12, 18

21 U.S.C. § 841(b)(1)(A) 2, 10, 12

21 U.S.C. § 851 ..... 2, 4, 7

28 U.S.C. § 2255 ..... *passim*

Act of November 2, 1951, 65 Stat. 767 16

Fed. R. Crim. P. 32(d)(1) 15

Pub. L. No. 91-513 13

Pub. L. No. 98-473 § 502, 98 Stat. 2068-2069 13

U.S.S.G. § 4A1.2(a) 18

U.S.S.G. § 4A1.2(f) 18

PETITION FOR A WRIT OF CERTIORARI

The petitioner, George Rodriguez, petitions this Court to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINION BELOW

The opinion of the lower appellate court is unpublished. That opinion is reproduced in the appendix to this petition at Appendix (hereafter App.) 1.

BASIS FOR JURISDICTION

The opinion of the lower court was filed on November 13, 2002.

This Court has jurisdiction to review the decision of a lower federal appellate court pursuant to Title 28 United States Code section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The **Fifth Amendment to the Constitution of the United States** provides in pertinent part:

> No person . . . shall be deprived of life, liberty, or property, without due process of law; . . . .

Title 21 United States Code section 841(b)(1)(A) provides in pertinent part:

> In case of a violation of subsection (a) of this section involving . . . (ii) five kilograms or more of . . . (II) cocaine, . . . ; such person shall be sentenced to a term of imprisonment which may not be less than 10 years. . . . If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years. . . . * * *

Title 21 United States Code section 851 provides in pertinent part:

(a) Information filed by United States Attorney

> (1) No person who stands convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, . . . , the United States attorney files an information with the court . . . stating in writing the previous convictions to be relied on. * * *

(b) Affirmation or denial of previous conviction

> If the United States attorney files an information under this section, the court shall after conviction but before pronouncement of sentence inquire of the person with respect to whom the information was filed whether he affirms or denies that he has been previously convicted as alleged in the information, and shall inform him that any challenge to a prior conviction which is not made before sentence is imposed may not thereafter be raised to attack the sentence.

(c) Denial, written response; hearing

(1) If the person denies any allegation of the information of prior conviction, or claims that the conviction is invalid, he shall file a written response of the information. * * * The court shall hold a hearing to determine any issues raised by the response which would except the person from increased punishment. * * * Except as otherwise provide in paragraph (2) of this subsection, the United States attorney shall have the burden of proof beyond a reasonable doubt on any issue of fact. * * *

(2) A person claiming that a conviction alleged in the information was obtained in violation of the Constitution of the United States shall set forth his claim and the factual basis therefor, with particularity in his response to the information. * * * Any challenge to a prior conviction, not raised by response to the information before an increased sentence is imposed in reliance thereon, shall be waived unless good cause be shown for failure to make a timely challenge.

(d) Imposition of sentence.

(1) If the person files no response or if the court determines, after hearing, that the person is subject to increased punishment by reason of prior convictions, the court shall proceed to impose sentence upon him as provided by this part.

(2) * * *

(e) Statute of limitations

No person who stands convicted of an offense under this part may challenge the validity of any prior conviction alleged under this section which

> occurred more than five years before the date of the information alleging such prior conviction.

Title 28 United States Code section 2255 provides in pertinent part:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed sentence to vacate, set aside or correct the sentence.

STATEMENT OF THE CASE

In March of 1997, petitioner George Rodriguez, was indicted in the United States District Court for the Southern District of Florida. This defendant was convicted of several federal drug crimes, namely conspiracy to possess with intent to distribute cocaine and two counts of possession of cocaine with intent to distribute.

In the federal criminal prosecution, the Government had filed an information pursuant to Title 21 United States Code section 851 for the purpose of enhancing any sentence to be imposed on petitioner Rodriguez, in the event that this defendant was subsequently convicted of the drug crimes with which he was charged. The Government asserted that attached documentation established that petitioner

Rodriguez had previously been convicted of a drug crime in the State of Florida in June of 1987.

To establish this prior Florida conviction, the Government *did not* submit to the federal court and *did not* rely on a document that was a formal official Florida criminal judgment of conviction. The Government *did not* rely on any document signed by the Florida trial judge. Rather, the Government relied on a transcript of a hearing held on June 8, 1987 in the Circuit Court for the Eleventh Judicial Circuit of Florida. The transcript of that State of Florida plea proceeding is included in this petition at App. 12.[1] This transcript established that petitioner Rodriguez pled "no contest" to a drug crime involving, as the State of Florida trial judge characterized it, a "minuscule amount of cocaine" "way less than one gram." The trial judge found that this no contest plea was voluntary. The trial court withheld adjudication. The trial judge decided not to impose a fine to be paid to the State, but rather requested that this defendant make "a voluntary contribution" to a local Optimist Club.

After his federal conviction, a presentence investigation report was prepared for the United States District Court judge. That report established that in this federal prosecution petitioner Rodriguez was among the less culpable of his codefendants. That report also calculated that the petitioner Rodriguez should be sentenced to imprisonment within a range of 135 to 168 months, *but for*

[1] This transcript was included as part of the record on this appeal and was also made an appendix to the Government's answer brief.

the sentencing enhancement for a prior conviction which required a mandatory minimum sentence of 240 months.

At the federal sentencing hearing, petitioner Rodriguez's defense attorney conceded that petitioner Rodriguez had a prior Florida drug conviction for the purpose of enhancement of his federal sentence, although defense counsel knew – and stated during this federal sentencing hearing – that his client had pled no contest in the prior Florida case, that the Florida trial judge had withheld adjudication, and that, in Florida, petitioner Rodriguez would not be considered to have been convicted under Florida law. Defense counsel observed that a fine could not lawfully have been imposed under Florida law, if adjudication was withheld. Nevertheless, defense counsel conceded that the federal trial judge had to follow the opinion in *United States v. Smith*, 96 F.3d 1350 (11th Cir. 1996), but also stated that the Supreme Court of the United States had never addressed this issue. During the sentencing proceeding, defense counsel informed the trial judge that absent this "conviction," petitioner Rodriguez otherwise potentially would have qualified for the safety valve guideline provision, U.S.S.G. § 5.C1.2. Defense counsel recognized that an enhancement based on this prior "conviction" would result in at least an additional term of imprisonment of thirteen to fourteen years.

Although the prosecutor "conced[ed]" at sentencing that this was "a harsh sentence under the circumstances" and based on the statutory enhancement to a mandatory minimum sentence of twenty years, the lower court sentenced the defendant to three concurrent terms of twenty years imprisonment.

Petitioner Rodriguez took a direct appeal of his federal judgment. In that appeal, petitioner Rodriguez was represented by different counsel. Among other things, the appellate attorney attempted to raise an issue on direct appeal that the enhancement pursuant to 21 U.S.C. § 851(a) was invalid because the Government failed to prove that petitioner Rodriguez was in fact convicted of a prior offense since there was **no finding of guilt** on his prior nolo contendere plea in the state court in 1987. Appellate counsel based his argument on an attempt to distinguish the opinions in *United States v. Smith*, 96 F.3d 1350 (11th Cir. 1996), which trial counsel had conceded was binding on the federal trial judge, and the case upon which that *Smith* opinion relied, namely *United States v. Mejias*, 47 F.3d 401 (11th Cir. 1995). The lower appellate court affirmed the judgment in an unpublished opinion. *United States v. Rodriguez*, 189 F.3d 485 (11th Cir. 1999). A copy of the pertinent portion of that unpublished opinion is contained in the appendix to this petition at App. 18.[2] Simply stated, the lower appellate court ruled that neither a finding of guilt nor an adjudication of guilt is necessary for a conviction.

Within one year of the issuance of a mandate of the lower appellate court at the conclusion of the direct appellate process, petitioner Rodriguez timely filed a motion to vacate his judgment pursuant to Title 28 United States Code section 2255. Petitioner Rodriguez asserted that his sentence was illegal, because the trial court enhanced his sentence based upon a prior drug conviction and because

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[2] The Government included that unpublished opinion in the appendix to the answer brief it filed for this appeal.

there had been no prior conviction. The trial court denied that motion without prejudice to refiling.

Petitioner Rodriguez filed an amended motion to vacate his judgment pursuant to Title 28 United States Code section 2255. In that motion, petitioner Rodriguez argued that his sentence was in excess of the maximum allowed by law, based on the following reasoning. If a prior final felony "conviction" did not exist in his case, petitioner could only be sentenced to a maximum sentence of ten (10) years imprisonment. The legal issue was what Congress meant by the word "conviction," in the federal drug statute at issue in this case, 21 U.S.C. § 841. The meaning of that word is determined by federal law and the application of that federal law to the facts of the State of Florida 1987 proceeding. The decision of *Lott v. United States*, 367 U.S. 421 (1961) was binding on the trial court and establishes that under federal criminal law, a mere plea of no contest is not itself a "conviction." Moreover, *United States v. Dotson*, 555 F.2d 134 (5th Cir. 1977), was also binding on the trial court, because en banc Eleventh Circuit precedent, *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981), established that Old Fifth Circuit decisions filed before the 1981 creation of the Eleventh Circuit were binding precedent. Not only were both opinions overlooked by the Eleventh Circuit in *United States v. Mejias*, 47 F.3d 401 (11th Cir. 1995), *Mejias*, itself, was based on flawed legal analysis. *United States v. Smith*, 96 F.3d 1350 (11th Cir. 1996) merely followed what it thought was binding prior circuit precedent contained in *Mejias*. Petitioner Rodriguez argued that what appeared to be a conundrum based on a conflict between *Mejias* and the pair of opinions of *Lott* and *Dotson* presented no difficulty at all. Binding precedent from the Eleventh Circuit established that *Lott*

and *Dotson* must be applied to the facts contained in the 1987 State of Florida transcript, rather than the subsequent Eleventh Circuit opinions of *Mejias* and *Smith*.

The federal trial judge denied this postconviction motion. First, the trial judge ruled that he need not address this issue, because the basic issue had been raised and disposed of during petitioner Rodriguez's direct appeal. Second, the trial judge ruled that this issue was resolved by *United States v. Mejias*, 47 F.3d 401 (11th Cir. 1995) and that that decision was still valid law.

Petitioner Rodriquez filed a motion for reconsideration of that order. **First**, petitioner Rodriguez asserted that his argument was not addressed during the direct appellate process, because prior counsel never mentioned the existence of – or the controlling authority of – *Lott v. United States*, *supra*, and *United States v. Dotson*, *supra*. The allegation of the original 2255 motion established ineffective assistance of trial counsel in not discovering this binding precedent and conceding that *Smith*, *supra*, was controlling. **Second**, the trial judge could not rely on the doctrine that it need not consider a claim, which was asserted in a 2255 motion, if that claim had been raised on direct appeal. The application of that doctrine to these facts was legally erroneous for several reasons. Because sentencing errors such as the one that occurred here are always raisable on appeal, the application of a procedural bar to an attack on the legality of the sentence in 2255 motions would mean that Congress had enacted a meaningless remedy regarding sentences imposed "in violation of the . . . laws of the United States, . . . , or . . . in excess of the maximum authorized by law. . . . " Moreover an application of the law of the case doctrine is not binding where the prior appellate decision was clearly erroneous and

would work a manifest injustice. **Third**, petitioner Rodriguez challenged this rationale of avoidance by asserting that any procedural bar to asserting *Lott* and *Dotson* was a procedural default excused by as a result of the cause of ineffective assistance of counsel and the doctrine of actual innocence. **Fourth**, refusal of the trial judge to follow the binding precedent of *Lott* and *Dotson* would be a violation of the Due Process Clause of the Fifth Amendment. **Fifth**, petitioner argued that any sentence in violation of the statutory maximum was a Fifth Amendment violation of Due Process of law.

In a terse order, the trial judge denied the motion for reconsideration following "consider[ing of] the motion and the pertinent portions of the record." (App. 9).

Petitioner Rodriguez filed a motion for a certificate of appealability in which he summarized the arguments made in his original motion and his motion for reconsideration, stating that "[t]he arguments raised by the defendant are both claims of an excessive sentence and various constitutional arguments including a denial of effective assistance of counsel and a denial of due process." In the "wherefore clause" of that motion, petitioner Rodriguez requested the trial judge "to issue a certificate of appealability on all issues raised before this Court pertaining to the enhancement of his sentence by use of the Florida plea of no contest without an adjudication." The trial judge granted a certificate of appealability "as to Petitioner's sentence enhancement under 21 U.S.C. § 841(b)(1)(A) based on a plea of *nolo contendere* and subsequent withholding of adjudication in a pervious state court drug possession case." (App. 10).

Based on the fact that the Eleventh Circuit precedent of *Mejias* and *Smith* conflicted with prior binding precedent of both the Supreme Court of the United States and the Old Fifth Circuit, petitioner Rodriguez filed an unusual, but authorized, petition for an initial hearing of his appeal by the Eleventh Circuit sitting en banc. That petition was subsequently denied. (App. 6).

On appeal, petitioner Rodriguez raised three issues. First, petitioner argued that he had been denied due process of law, because he had been sentenced in excess of the statutory maximum authorized by the controlling statute on the facts of his case and because the trial judge arbitrarily refused to apply binding case law. Second, petitioner Rodriguez argued for reversal on the basis that he had received ineffective assistance of counsel. Third, petitioner Rodriguez argued that the trial judge abused his discretion in denying the 2255 motion on the basis of what was raised and decided on direct appeal.

This appeal was decided by a three-judge panel. (App. 1). Two of the judges on this panel were also two of the three judges who decided petitioner's direct appeal. (App. 1, 18). The full opinion of that lower appellate court is contained at App. 1-5. First, the appellate court ruled that the trial judge did not have to revisit the lawfulness of this sentence enhancement, because the basic issue had been decided on direct appeal. The two "new" cases of *Lott* and *Dotson* were previously available to the petitioner at his original sentencing hearing. Even if petitioner Rodriguez could show cause for failure to previously argue those opinions, petitioner Rodriguez could never satisfy the prejudice prong required for relief. The Eleventh Circuit precedent of *Mejias* and *Smith* are valid. The decisions of *Lott* and *Dotson* "are readily distinguishable and have no

bearing on whether a nolo contendere plea constitutes a conviction under § 841(b)(1)(A)." Finally, the issue of ineffective assistance of counsel was not to be considered because the issues on appeal were limited by the certificate of appealability and the trial court order granting that certificate discussed only the sentence-enhancement claim.[3] Even if the claim of ineffective assistance was before the Eleventh Circuit on this appeal, petitioner Rodriguez failed to satisfy the element of prejudice on his claim of ineffective assistance of counsel, because the Eleventh Circuit was here ruling that *Mejias* and those subsequent Eleventh Circuit decisions following *Mejias* were not rendered invalid by *Lott* and *Dotson*.

REASONS FOR GRANTING THE PETITION

Question One

Title 21 United States Code section 841 contains a sentencing enhancement provision. The pertinent provision of that statute provides that a mandatory minimum sentence of twenty years be imposed for a violation of this federal criminal drug statute if the person commits this drug crime "after a prior **conviction** for a felony drug offense has become final."

[3] The Government never argued in its answer brief that the trial judge limited the issues in his order granting a certificate of appealability. The Government wrote in its brief that "[t]he certificate of appealability issued by the district court is somewhat broad in its scope. . . ." Both parties understood the certificate to encompass all issues raised in the 2255 motion and motion for reconsideration. Indeed, the Eleventh Circuit, itself, never sought clarification of that certificate prior to issuance of its opinion.

This enhancement statute was enacted in the year 1970. This original version only referred to prior **federal** drug convictions as the basis for increasing the length of imprisonment. Congress never defined the word "conviction" as used in this statute. Pub. L. No. 91-513, 84 Stat. 1242-1245, 1261, 1262, 1264, 1265. In the year 1984, Congress expanded the reach of this enhancement statute by amending the language to include prior state drug convictions in addition to any prior federal drug convictions. Pub. L. No. 98-473 § 502, 98 Stat. 2068-2069. However, Congress retained from the original enactment the requirement that there must be a prior "conviction." Although now including prior state convictions, Congress still did not define the word "conviction" and certainly did not indicate that its meaning for its word "conviction" was now different than Congress intended in the year 1970.

First, and foremost, this is a matter of statutory construction. *See Dickerson v. New Banner Inst., Inc.*, 460 U.S. 103 (1983) (construction of the word "convicted" in federal firearms statute). Because this drug-crime sentencing-enhancement statute was enacted in the year 1970 and in the year 1970 was limited to prior federal criminal convictions, the issue becomes what the word "conviction" meant **in the year 1970** in federal criminal cases.[4] In light of the expansion of this statute, the word "conviction"

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[4] Petitioner Rodriguez's case materially differs from that decided in *Dickerson v. New Banner Inst., Inc.*, 460 U.S. 103 (1983). *Dickerson* interpreted a statute that, as originally enacted, applied to any person "who has been convicted in **any court** of a crime punishable by imprisonment for a term exceeding one year." *Id.* at 105. Moreover, *Dickerson*, itself, noted that the terms "convicted" or "conviction" do not have the same meaning in every federal statute. *Id.* at 112 n.6.

now had to cover the law in fifty states, in addition to federal criminal law. The problem is that each state has its own criminal laws. At best, Congress had to intend that the federal criminal courts had to apply federal legal principles as they existed in the year 1970 to the fact of various state court criminal proceedings to reach the same result for state "convictions" that would be reached when evaluating whether a federal "conviction" would be found to exist in a federal criminal proceeding in which identical facts were present. *See Dickerson v. New Banner Inst., Inc.*, 460 U.S. 103 (1983).

In this case, the facts to which that federal law must be applied are those contained in petitioner Rodriguez's 1987 State of Florida prosecution. Those facts are not in dispute. That prior Florida proceeding involved (1) a plea of no contest, (2) no adjudication of guilt, (3) no finding of guilt, (4) no written judgment, and (5) no sentence to serve any period of imprisonment, to be placed on probation, or to pay a fine to the State of Florida. As of 1988, Florida law was clear that there was no "conviction" under Florida law. *Garron v. State*, 528 So.2d 353 at 360 (Fla. 1988). Indeed, even the lower federal appellate court recognized that this was the law in Florida. *United States v. Willis*, 106 F.2d 966 (11th Cir. 1997).

If those same Florida facts were presented to a United States District Court, the result would be that no "conviction" occurred in federal court.

First, this Court stated in *Lott v. United States*, 367 U.S. 421 (1961): "[A] plea of nolo contendere . . . * * * is tantamount to 'an admission of guilt for the purpose of the case. . . . Yet *the plea itself does not constitute a conviction* nor hence a 'determination of guilt.' It is only a confession

of the well-pleaded facts in the charge. It does not dispose of the case. It is still up to the court to 'render judgment' thereon. * * * Necessarily, then, it is the judgment of the court – not the plea – that constitutes the 'determination of guilt.'" *Id.* at 426-427.

Lott, supra, is of special importance. *Lott* is a Supreme Court decision defining the word "conviction" in the year 1961. The statute in question used the word "conviction," when it was subsequently enacted in the year 1970. Courts presume that Congress intended its statutes to be read in conformity with prior Supreme Court precedent. *Porter v. Nussle*, 534 U.S. 516 at 528 (2002). A prior United States Supreme Court definition of a term is of significant assistance, if not decisive, of the meaning intended by Congress to be given to that same word. *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 at 614 (1992).

Second, under then existing federal law, both a plea of guilty, which is accepted by a court, and the entry of a formal judgment are convictions under federal law.[5] *Dickerson v. New Banner Inst., Inc.*, 460 U.S. 103 at 112 n.6 (1983). Neither are present in petitioner Rodriguez's 1987 Florida criminal prosecution.

The final issue is whether the failure of the Florida judge to adjudicate petitioner Rodriguez guilty following a no contest plea can constitute a conviction under Federal

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[5] In federal court, a federal court will enter a judgment against a federal criminal defendant who enters a plea of no contest that is accepted by the federal judge. It is the judgment that must contain the plea, the verdict or findings, the adjudication and the sentence. Fed. R. Crim. P. 32(d)(1).

criminal law in the year 1970. While this Court has not addressed that issue, other federal precedent has evaluated the effect of a failure to adjudicate a federal criminal defendant under federal law existing in 1970.

The position of petitioner Rodriguez is made strong by the opinion in *Gonzalez v. United States*, 224 F.2d 431 (1st Cir. 1955). Prior to the present drug enhancement legislation enacted in the year 1970, Congress had previously provided for a sentencing enhancement for drug offenders, who had previously been convicted. That legislation was enacted in the year 1951 and was contained in the then-codified Title 21 United States Code section 174. Act of November 2, 1951, 65 Stat. 767. In that statute, an offender was considered a second or subsequent narcotics offender, "if he previously has been convicted" of a specified federal narcotics offense. *Gonzalez* held that the decisive judicial event is the adjudication of guilt and that an adjudication of guilt should be required in order to constitute a "conviction" within the meaning of that federal statute.[6]

Subsequently, *United States v. Dotson*, 555 F.2d 134 (5th Cir. 1977) held that in the year 1972 a federal

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[6] That is the precise holding of *United States v. Acosta*, 287 F.3d 1034 (11th Cir. 2002) for the present statute at issue in this case. Regarding another federal criminal statute, this Court has held in *Deal v. United States*, 508 U.S. 129 (1993): "It is certainly correct that the word 'conviction' can mean either the finding of guilt or the entry of a final judgment on that finding. * * * In the context of [18 U.S.C.] § 924(c)(1), we think it unambiguous that 'conviction' refers to the finding of guilt by a judge or jury that necessarily precedes the entry of a final judgment of conviction. A judgment of conviction includes both the adjudication of guilt and the sentence. See Fed. Rule Crim. Proc. 32(b)(1)." *Id.* at 131-132.

criminal defendant was not "previously convicted" where the federal judge in a prior federal criminal case accepted that defendant's plea of nolo contendere to the charge and imposed a suspended sentence and one-year probation term, specifically withholding any adjudication of guilt. *Dotson* – a case emanating from Florida and binding on the trial court in this case – held identically what *Gonzalez* previously held.

At present, a federal judge has no authority to withhold adjudication in a federal criminal case. *United States v. Cannon*, 778 F.2d 747 (11th Cir. 1985). But the issue is not what would have happened in federal court to petitioner Rodriguez had he committed the same crime and been prosecuted federally, but rather what the result is when federal legal principles apply to the actual state court events that did occur in the State of Florida criminal proceeding. While federal criminal legal principles apply, the Government must take the Florida facts as it finds them. Here, petitioner Rodriguez was not adjudicated in the Florida proceeding.

In this case, the lower federal court held that its prior decision in *United States v. Mejias*, 47 F.3d 401 (11th Cir. 1995) was valid and controlling. *Mejias* construed the phrase "after a prior conviction for a felony drug offense has become final" in Title 21 United States Code section 841(b)(1)(B). *Mejias* did not employ an analysis of statutory construction. Instead, *Mejias* relied on a prior decision construing a present federal sentencing guideline, U.S.S.G. § 4B1.1 that did not go into effect until the year 1987.[7]

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[7] Sentencing guidelines did not come into effect until the year 1987. The work of the United States Sentencing Commission does not

(Continued on following page)

United States v. Smith, 96 F.3d 1350 (11th Cir. 1996) was also relied on by the lower federal courts. *Smith* used *Mejias* as binding authority to issue the identical holding regarding a Florida plea of no contest followed by a withholding of adjudication. In so doing, the *Smith* panel believed that it was applying binding law that each succeeding panel is bound by the holding of the first panel to address an issue of law, unless and until overruled en banc, or by the Supreme Court – even if convinced that the prior holding is wrong. *United States v. Goldin Indus., Inc.*, 219 F.3d 1268 at 1270 n. 2 (11th Cir. 2000) (en banc); *United States v. Steele*, 147 F.3d 1316 at 1317-1318 (11th Cir. 1998) (en banc). *Smith* merely perpetuated the error created in *Mejias*.

This Court has never addressed the issue of what is sufficient to constitute a prior "conviction" for the purpose of enhancing a drug sentence pursuant to 21 U.S.C. § 841. That issue is as important as – and likely will apply to

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retroactively define the intent of Congress in 1970. Thus, the sentencing guidelines, themselves, do not resolve this issue.

Nevertheless, petitioner Rodriguez notes that U.S.S.G. § 4A1.2(a) is used to determine criminal history points and defines a "prior sentence" as "any sentence previously imposed upon adjudication of guilt, whether by guilty plea, trial or plea of nolo contendere, for conduct not part of the instant offense." That guideline also provides: "'Convicted of an offense,' for the purpose of this provision, means that the guilt of the defendant has been established, whether by guilty plea, trial, or plea of nolo contendere."

U.S.S.G. § 4A1.2(f) provides: "Diversion from the judicial process without a finding of guilt (e.g., deferred prosecution) is not counted. A diversionary disposition resulting from a finding or admission of guilt, or a plea of nolo contendere, in a judicial proceeding is counted as a sentence under § 4A1.1(c) even if a conviction is not formally entered, except that diversion from juvenile court is not counted."

more federal criminal cases than – the similar issues decided in *Deal v. United States*, 508 U.S. 129 (1993) and *Dickerson v. New Banner Inst., Inc.*, 460 U.S. 103 (1983) involving federal firearms legislation.

In this case, petitioner Rodriguez received an additional ten years of incarceration for the possession of a minuscule amount of cocaine on state-court facts which do not support a legal finding of a "conviction" under federal law existing in the year 1970 when that word was inserted into the pertinent federal statute. Others similarly situated should not have to suffer the loss of those extra years of freedom.

Question Two

One obvious purpose of 28 U.S.C. § 2255 was to protect the due process right of a federal criminal defendant, who was subject to a prior erroneous sentence imposed in violation of federal law and imposed in excess of the statutory maximum. In this case, the essence of this 2255 litigation was the legality of the sentence imposed upon petitioner Rodriguez. Sentencing errors of this type are always raisable on appeal. Consequently, for claims of this nature, the application of a procedural bar using the principle stated in *United States v. Rowan*, 663 F.2d 1034 (11th Cir. 1981) would make 28 U.S.C. § 2255 a meaningless remedy in the context of a federal sentencing issue. Congress cannot be deemed to have enacted a meaningless statute regarding sentences "imposed in violation of the . . . laws of the United States, . . . , or . . . in excess of the maximum authorized by law. . . . " Thus, the trial court's application of *Rowan* to these facts must be rejected as a matter of common sense.

Rowan did not hold that a district court is absolutely barred from considering, on a 2255 motion, an issue previously raised on direct appeal. Assuming for the sake of argument that the precise claim raised on petitioner Rodriguez's direct appeal was the identical claim being raised in his 2255 motion, *Rowan* is no more than an application of the doctrine of the law of the case. *Rowan* expressly states that the appellate court is not "required" to reconsider an issue actually raised and decided on direct appeal. *Rowan* does not state that, as a matter of law, a court cannot ever revisit an issue again in a particular case.

This Court has previously deemed it important to review the scope of 28 U.S.C. § 2255 motions in a similar context. In *Davis v. United States*, 417 U.S. 333 (1974), this Court held that a defendant was entitled to relitigate on a 2255 motion an issue which was decided on direct appeal, where there had been an intervening change in the law. That ruling should be extended to situations such as presented by petitioner Rodriguez, where the failure of the prior courts to consider binding precedent occurred and where that sentence was in fact in violation of the law and in excess of the statutory maximum. No person should be required to spend an extra day in jail – let alone ten more years – based on an illegal sentence. Under those circumstances there should be no discretion to avoid correction of the sentence.

Here, petitioner Rodriguez's original trial counsel conceded the applicability of *United States v. Mejias*, 47 F.3d 401 (11th Cir. 1995) and *United States v. Smith*, 96 F.3d 1350 (11th Cir. 1996) to this case. Defense counsel did not argue either the binding precedent of *Lott v. United States*, 367 U.S. 421 (1961) or *United States v. Dotson*, 555

F.2d 134 (5th Cir. 1977). Assuming that a federal district judge has discretion to not consider a claim such as that asserted by petitioner Rodriguez, this Court should consider whether the cause and prejudice standards and the actual innocence standards apply to permit consideration of an arguably forfeited issue that was asserted as plain error on appeal also without argument of either *Lott* or *Dotson*. *See Murray v. Carrier*, 477 U.S. 478 (1986); *United States v. Maybeck*, 23 F.3d 888 (4th Cir. 1994).

Sentencing errors of this kind are so easily corrected and present absolutely no prejudice to the Government. It bears reiteration that no person should be required to spend an extra day in jail based on an illegal sentence. For those reasons, this second question is an important legal issue of national significance to the federal criminal justice system.

CONCLUSION

For the above stated reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

ARTHUR JOEL BERGER
Counsel of Record for Petitioners
11621 S.W. 105th Terrace
Miami, Florida 33176
Phone: (305) 274-3430

APPENDIX

Page

Opinion of the Lower Appellate Court ..... App. 1

Order of the Lower Appellate Court denying petition for hearing en banc ..... App. 6

Order of the U.S. District Court denying motion pursuant to Title 28 U.S.C. § 2255 ..... App. 7

Order of the U.S. District Court denying motion for reconsideration ..... App. 9

Order of the U.S. District Court granting certificate of appealability ..... App. 10

Transcript of State of Florida plea proceeding ..... App. 12

Excerpt of Opinion of the Lower Appellate Court on direct appeal ..... App. 18

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 02-11540
Non-Argument Calendar

D.C. Docket Nos. 01-4983-CV-FAM
and 97-00187-CR-FAM

GEORGE RODRIGUEZ,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(Filed November 13, 2002)

Before CARNES, BARKETT and HULL, Circuit Judges.

PER CURIAM:

George Rodriguez appeals the district court's order denying his motion pursuant to 28 U.S.C. § 2255 to vacate, set aside, or correct his 240-month sentence for violations of 21 U.S.C. §§ 846 and 841(a)(1). Rodriguez received an enhanced sentence pursuant to 21 U.S.C. § 841(b)(1)(A),

based on the sentencing court's determination that he had a prior "conviction" for a felony drug offense.

On direct appeal to this court, Rodriguez asserted, *inter alia*, that the enhancement was improper because (1) the prior "conviction" relied upon by the government was a *nolo contendere* plea that resulted in adjudication being withheld in state court and therefore required no finding of guilty; and (2) the prior offense was not prosecuted by indictment. This court affirmed the sentence, relying on *United States v. Smith*, 96 F.3d 1350, 1351 (11th Cir. 1996), and *United States v. Mejias*, 47 F.3d 401, 403-4 (11th Cir. 1995).

In the present § 2255 proceeding, Rodriguez again challenges the enhancement of his sentence. For the first time, he asserts that two binding cases predating *Smith* and *Mejias*: *Lott v. United States*, 367 U.S. 421, 426 (1961), and *United States v. Dotson*, 555 F.2d 134, 135 (5th Cir. 1977),[1] establish that a *nolo contendere* plea resulting in adjudication being withheld in state court does not constitute a conviction for purposes of § 841(b)(1)(A). The district court denied this claim for two reasons: (1) this court had already considered and rejected the same claim on direct appeal; and (2) the law of the Circuit establishes that a *nolo contendere* plea is a conviction for purposes of § 841(b)(1)(A). Rodriguez subsequently moved for reconsideration of the district court's denial of the § 2255 motion, asking that the claim be considered as one for

[1] Decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981 are binding precedent on this court. *See Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

ineffective assistance of counsel, based on defense counsel's failure to utilize *Lott* and *Dotson* to challenge the enhancement either at sentencing or on direct appeal. The district court summarily denied the motion for reconsideration and certified an appeal from its ruling on the sentence-enhancement claim.

On appeal, Rodriguez argues that the district court erroneously denied his § 2255 motion, asserting that his sentence-enhancement claim was properly before the district court and that the "new" cases required a ruling in his favor. Additionally, Rodriguez argues that the district court erred in denying his motion for reconsideration of the denial of his § 2255 motion, as he asserted a worthy claim of ineffective assistance of counsel.

We review the district court's factual findings for clear error and its legal conclusions *de novo*. *See Castillo v. United States*, 200 F.3d 735, 736 (11th Cir.), *cert. denied*, 531 U.S. 845 (2000). Having reviewed the record in this light, we conclude that no error was committed by the district court.

First, the district court correctly concluded that it was not required to address Rodriguez's challenge to the enhancement of his sentence, as it was previously considered and rejected by this court on direct appeal. *See United States v. Rowan*, 663 F.2d 1034, 1035 (11th Cir. 1981). While Rodriguez now relies on two "new" cases to challenge the enhancement, they were previously available to him and therefore do not require a rehearing. *United States v. Nyhius*, 211 F.3d 1340, 1343 (11th Cir. 2000), *cert. denied*, 531 U.S. 1131 (2001). Even if he could show cause for his failure to offer the "new" cases on direct

appeal, he cannot show that he suffered prejudiced as a result, for the reason discussed below.

It is well established in the Eleventh Circuit that a "'prior plea of *nolo contendere* with adjudication withheld in [a] Florida state court is a 'conviction' that supports an enhanced sentence under [federal narcotics law].'" *United States v. Smith*, 96 F.3d 1350, 1351 (11th Cir. 1996) (quoting *United States v. Mejias*, 47 F.3d 401, 404 (11th Cir. 1995)). The two cases now offered by Rodriguez do not compel a contrary conclusion, as they are readily distinguishable and have no bearing on whether a *nolo contendere* plea constitutes a conviction under § 841(b)(1)(A). *See Lott*, 367 U.S. at 426 (holding that the judgment of conviction and sentence, not the tender and acceptance of a *nolo contendere* plea, constituted a "determination of guilt" within the meaning of former Rule 34 for purposes of triggering the 10-day appeal period under Rule 37(a)(1)); *Dotson*, 555 F.2d at 135 (holding that a *nolo contendere* plea is not a "conviction" within meaning of federal firearms statute, 18 U.S.C. § 922, which requires that defendant be aware of his felon status at time of transaction giving rise to offense). Accordingly, we find no error in the district court's determination that Rodriguez's *nolo contendere* plea was properly considered to be a "conviction" for purposes of his sentencing under § 841(b)(1)(A).

Finally, we discuss Rodriguez's argument that his defense counsel was ineffective for failing to challenge the sentence enhancement based on *Lott* and *Dotson* at sentencing and on direct appeal. Initially, we note that this issue is not properly before us. Because Rodriguez filed his petition after April 24, 1996, the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (1996), its

provisions apply. Under the AEDPA, appellate review in a § 2255 proceeding is limited to the issues specified in the Certificate of Appealability (COA). *Jones v. United States*, 224 F.3d 1251, 1254 (11th Cir. 2000). The district court order granting Rodriguez's COA discussed only his sentence-enhancement claim. Moreover, Rodriguez has not moved or otherwise requested that the scope of the COA be expanded to include his claim of ineffective assistance of counsel. *See Jones*, 224 F.3d at 1255-56. Accordingly, we need not review the district court's denial of that claim.

Assuming *arguendo* that the ineffective-assistance-of-counsel claim is properly before us, we find it without merit. Such a claim requires two showings: (1) that the representation received fell below an objectively reasonable standard; and (2) that there exists a reasonable probability that, but for the objectively unreasonable representation, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 688 (1984). Because we disagree with Rodriguez's assertion that *Lott* and *Dotson* were controlling precedent that conflicted with *Mejias* and *Smith*, he cannot establish any prejudice from counsel's failure to offer those cases. Thus, the district court did not err in rejecting Rodriguez's ineffective-assistance-of-counsel claim.

Upon review of the record and consideration of the parties' briefs, we find no reversible error.

For the foregoing reasons, the district court's denial of Rodriguez's § 2255 motion to vacate, set aside or correct his sentence is AFFIRMED.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 02-11540-JJ

GEORGE RODRIGUEZ,

Petition-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

On Petition for Hearing En Banc from the
United States District Court for the
Southern District of Florida

(Filed Oct. 29, 2002)

BEFORE: CARNES, BARKETT and HULL, Circuit Judges.

No Judge in regular service on the Court having requested that the Court be polled on hearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition for Hearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Rosemary Barkett
UNITED STATES
CIRCUIT JUDGE

CLOSED CIVIL CASE

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
Miami Division

**Case Number: 01-4983-CIV-MORENO/
97-0187-CR-MORENO**

UNITED STATES OF AMERICA,

Petitioner,

vs.

GEORGE RODRIGUEZ,

Respondent.

_____/

ORDER DENYING MOTION TO VACATE, SET ASIDE OR CORRECT SENTENCE

(Filed Feb. 11, 2002)

THIS CAUSE came before the Court upon the Petitioner's Motion to Vacate, Set Aside or Correct Sentence (D.E. No. 1), filed on December 11, 2001.

THE COURT has considered the motion, response, and the pertinent portions of the record, and being otherwise fully advised in the premises, it is

ADJUDGED that the motion is DENIED. Petitioner argues that the district court erred when it enhanced his sentence based on a plea of *nolo contendere* and subsequent withhold of adjudication in a previous state court drug possession case. This issue was also raised and disposed of on Petitioner's direct appeal to the United

States Court of Appeals for the Eleventh Circuit. Accordingly, the Court need not consider the issue. *See United States v. Rowan*, 663 F.2d 1034, 1035 (11th Cir. 1981).

Moreover, the Eleventh Circuit has explained that a withhold of adjudication on plea of *nolo contendere* in Florida state court qualifies as a "conviction" for purposes of sentencing enhancements. *United States v. Mejias*, 47 F.3d 401, 404 (11th Cir. 1995). "This conclusion is still good law and has been cited . . . with approval by [the Eleventh Circuit]." *United States v. Fernandez*, 234 F.3d 1345, 1347 (11th Cir. 2000). The Petitioner's motion is therefore denied.

DONE AND ORDERED in Chambers at Miami, Florida, this 11th day of February, 2002.

/s/ Federico A. Moreno
FEDERICO A. MORENO
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
Miami Division

Case Number: 01-4983-CIV-MORENO
97-0187-CR-MORENO

UNITED STATES OF AMERICA,

Plaintiff/Respondent,

vs.

GEORGE RODRIGUEZ,

Defendant/Petitioner.

_____/

ORDER DENYING MOTION FOR RECONSIDERATION

(Filed Mar. 5, 2002)

THIS CAUSE came before the Court upon Petitioner's Motion for Reconsideration (D.E. No. 5), filed on February 21, 2002.

THE COURT has considered the motion and the pertinent portions of the record, and being otherwise fully advised in the premises, it is

ADJUDGED that the motion is DENIED.

DONE AND ORDERED in Chambers at Miami, Florida, this 1st day of March, 2002.

/s/ Federico A. Moreno
FEDERICO A. MORENO
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
Miami Division

Case Number: 01-4983-CIV-MORENO
97-0187-CR-MORENO

UNITED STATES OF AMERICA,

Plaintiff/Respondent,

vs.

GEORGE RODRIGUEZ,

Defendant/Petitioner.
_____/

ORDER GRANTING CERTIFICATE OF APPEALABILITY

(Filed Apr. 9, 2002)

THIS CAUSE came before the Court upon Petitioner's Motion for Certificate of Appealability (D.E. No. 8), filed on March 15, 2002.

THE COURT has considered the motion and the pertinent portions of the record, and being otherwise fully advised in the premises, it is

ADJUDGED that the motion for a certificate of appealability is GRANTED as to Petitioner's sentence enhancement under 21 U.S.C. § 841(b)(1)(A) based on a plea of *nolo contendere* and subsequent withhold of adjudication in a previous state court drug possession case.

DONE AND ORDERED in Chambers at Miami, Florida, this 8th day of April, 2002.

/s/ Federico A. Moreno
FEDERICO A. MORENO
UNITED STATES
DISTRICT JUDGE

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

ORIGINAL

CRIMINAL DIVISION

CASE NO. 87-16247

THE STATE OF FLORIDA,

Plaintiff,

vs.

GEORGE RODRIGUEZ,

Defendant.

_____/

Metropolitan Justice Bldg.
1351 Northwest 12th St.
Miami, Florida
June 8, 1987

(Filed Jun. 19, 1987)

The above-entitled cause came on for plea before the Honorable THOMAS M. CARNEY, Circuit Judge, pursuant to Notice.

APPEARANCES:

JANET RENO, STATE ATTORNEY,
BY: JERALD BAGLEY
Assistant State Attorney
On behalf of the Plaintiff.

BENNETT H. BRUMMER,
Public Defender,
By: RORY STEIN,
Assistant Public Defender,
On behalf of the Defendant

(Thereupon, the following proceedings were had:)

MR. STEIN: The gentleman that I am speaking to is George Rodriguez, page two of the arraignment calendar.

After discussing it with him, perhaps in an effort to close the case out, he would be willing to enter a no contest plea to the cocaine charge and pay a $50 fine. He has $50 on him down in his car.

THE COURT: Due to the minuscule amount of cocaine involved, it is less than – way less than one gram, I will accept the plea.

Swear him in.

(Thereupon, the defendant, George Rodriguez, was duly sworn.)

THE COURT: Your name, please.

THE DEFENDANT: George Carlos Rodriguez.

THE COURT: How many years do you have in school?

THE DEFENDANT: Is that college, your Honor?

THE COURT: That is school.

THE DEFENDANT: Well, in college one year.

THE COURT: What kind of work do you do?

THE DEFENDANT: I own my own taxi. I drive a cab.

THE COURT: Have you ever been treated for mental illness?

THE DEFENDANT: Never.

THE COURT: Are you presently under the influence of alcohol, medication or any illegal drug?

THE DEFENDANT: No.

THE COURT: Charges?

MR. BAGLEY: Possession of a controlled substance, carries a maximum of five years state prison.

THE COURT: Okay.

Are you an American citizen?

THE DEFENDANT: Yes, sir.

THE COURT: You have the right to plead not guilty or to persist in such a plea since it has already been made.

When you plead not guilty, you have the right to a trial by a judge or a trial by a jury as to your guilt or your innocence.

You have the right to remain silent.

You have the right to have the witnesses against you testify in front of you and have them cross-examined by your lawyer.

You have the right to make witnesses come to your trial and testify for you.

Do you understand by this plea there will be no further trial of any kind and that you give up your rights to a trial?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand when you plead no contest you give up your not guilty rights as well as your right to appeal?

THE DEFENDANT: Yes.

THE COURT: Do you understand that you are now under oath and untrue answers to my questions might subject you to a prosecution for perjury?

THE DEFENDANT: What is perjury?

MR. STEIN: If you lie under oath you can be penalized for lying.

THE DEFENDANT: Okay. Yes.

THE COURT: You have heard what has been agreed upon in your behalf to end this case.

Has anything more than that been promised to you by anybody?

THE DEFENDANT: Can you repeat back to me what the plea is?

THE COURT: $50 fine and withhold of adjudication.

THE DEFENDANT: Yes, sir.

THE COURT: Anybody forcing you to enter this plea?

THE DEFENDANT: No, sir.

THE COURT: Do you stipulate that the facts set forth in the A-form make out a prima facie case?

MR. STEIN: Yes, your Honor.

THE COURT: Do you acknowledge that this no contest plea is in your best interest?

THE DEFENDANT: Yes, sir.

THE COURT: You are represented by Mr. Stein. Are you satisfied with the job he has done for you?

THE DEFENDANT: Yes, sir.

THE COURT: Yes?

THE DEFENDANT: Yes, sir.

THE COURT: The Court will find that you are alert and intelligent, that you understand the nature of the charges and the consequences of your plea, and that the facts which the State is prepared to prove and by which your plea you admit are sufficient to sustain your plea.

The Court further finds that your decision to enter this plea has been freely, voluntarily and intelligently made, that you have had advice of a competent lawyer.

Based upon the plea to the Court, and that the facts proffered do show a prima facie case, the Court will withhold adjudication and sentence you to a $50 fine.

Let's make that a voluntary contribution to the Richmond Perrine Optimist Club. 9959 west Indigo Street, Perrine. Attention Billy Smith.

Do you have the money with you?

THE DEFENDANT: In my car, sir.

THE COURT: Go down and get it and bring it back up here.

THE DEFENDANT: Yes, sir.

(Thereupon, the proceedings were concluded.)

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 98-4849
Non-Argument Calendar

D.C. Docket No. 97-187-CR-FAM

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

GEORGE RODRIGUEZ,
a.k.a. Jorge,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

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(Filed July 8, 1999)

Before BLACK, CARNES, and BARKETT, Circuit Judges.

PER CURIAM:

[EXCERPT]

* * *

Third, and finally, we find the district court did not plainly err in imposing an enhanced sentence based on Rodriguez' prior drug conviction that was prosecuted by

information. Because a finding of guilt is not necessary and Rodriguez entered a plea of *nolo contendere* and adjudication was withheld in Florida state court, the district court did not err in finding that the prior drug offense was a "conviction" that supported an enhanced sentence. *See US v. Smith*, 96 F.3d at 1350, 1351 (11th Cir. 1996) ("prior plea of *nolo contendere* with adjudication withheld in a Florida state court is a 'conviction' that supports an enhanced sentence under [federal narcotics law]") (*quoting United States v. Mejias*, 47 F.3d 401, 403-4 (11th Cir. 1995)). In addition, Rodriguez's challenge to his 1987 "conviction" which formed the basis of the enhancement was more than five years old and thus his challenge to the validity of his prior "conviction" is barred by § 851(e). *See* 21 U.S.C. § 851(e).

* * *

AFFIRMED.